

1981

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### Recommended Citation

Thomas Sattler, *Variances and Parcel Rezoning: Relief from Restrictive Zoning in Nebraska*, 60 Neb. L. Rev. (1981)

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# Variances and Parcel Rezoning: Relief from Restrictive Zoning in Nebraska

## I. INTRODUCTION

Zoning ordinances restrict the use of property in order to achieve and promote the goals of a city or county in protecting the public health, safety and welfare.<sup>1</sup> These ordinances include various use, density, bulk and other restrictions. As contemporary society controls development in this manner, conflicts inevitably arise between private property interests and the broad societal goals reflected in zoning legislation.<sup>2</sup> Zoning restrictions are of particular concern to landowners and those involved with the acquisition of real estate. If an acquiring entity meets the requisite

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1. C. WILLIAMS & D. SHANEYFELT, *LAND USE AND THE LAW: A NEBRASKA PRIMER* 39 (1977):

It is generally agreed that: (1) zoning legislation is an exercise of the police power; (2) it is a legislative act by a governing body; (3) it is valid only if adopted for the public welfare; (4) it must be reasonable in its regulation in order to be valid; and (5) whether or not a zoning ordinance is reasonable depends upon the circumstances in each case.

*Id.*

2. For example, the following language appears as the preamble of the newly amended comprehensive zoning ordinance in Lincoln, Nebraska:

Purpose. This title has been made in accordance with a comprehensive plan and to promote health and the general welfare of the community. It is designed to lessen congestion in the streets; to secure safety from fire, flood, and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements. These regulations have been made with reasonable consideration, among other things, to the character of the district and its suitability for particular uses, and with a view to conserving the value of property and encouraging the most appropriate use of land throughout the City of Lincoln and the area within three miles thereof.

LINCOLN, NEB., CODE § 27.01.010 (1979). See NEB. REV. STAT. § 14-401 (Reissue 1977) (cities of the metropolitan class); *id.* § 15-902 (Reissue 1977) (cities of the primary class); *id.* § 19-901 (Reissue 1977) (villages, cities of the first and second class).

standing requirements,<sup>3</sup> like the private property owner it has judicial or administrative recourse in those situations where it may be unjustifiably harmed by application of a zoning ordinance. Avenues of relief typically include: (1) a challenge to the constitutionality of the regulation;<sup>4</sup> (2) a petition to the local legislative body requesting rezoning or an amendment to the respective ordinance;<sup>5</sup> or (3) administrative relief by a petition for a special exception, a special permit, or a variance.<sup>6</sup>

This comment will discuss avenues of relief from a Nebraska perspective, focusing primarily on the specific requirements and considerations under Nebraska law with respect to variances and parcel rezoning.

## II. VARIANCES IN NEBRASKA

A variance may be defined as an authorization for a property owner to use his land or property in a manner contrary to the express requirements of a zoning ordinance.<sup>7</sup> It is, in effect, "a license to violate the law."<sup>8</sup> Variances are generally allowed where

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3. As a general rule, one who is merely negotiating a purchase lacks standing. For a discussion of standing requirements, see notes 39-43 & accompanying text *infra*.
  4. A challenge might be based upon the legislative body's lack of power to adopt the relevant ordinance, or upon an assertion of improper enactment. These issues, however, are beyond the scope of this comment.
  5. See § III of text *infra*.
  6. See § II of text *infra*.
  7. See R. BABCOCK, *THE ZONING GAME* 7 (1966); A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* (4th ed. 1975); 6 P. ROHAN, *ZONING AND LAND USE CONTROLS* § 43 (1978); 2 E. YOKLEY, *ZONING LAW AND PRACTICE* § 15-5 (3d ed. 1965); Arneberg, *Variances in Zoning*, 24 U. KAN. CITY L. REV. 240 (1956); Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769 (1977); Dallstream & Hunt, *Variances, Exceptions and Special Uses*, 1954 U. ILL. L.F. 213; Ford, *Guidelines for Judicial Review in Zoning Variance Cases*, 58 MASS. L.Q. 15 (1973); Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California*, 5 U.C.L.A. L. REV. 179 (1958); Green, *The Power of the Zoning Board of Adjustment to Grant Variances from the Zoning Ordinances*, 29 N.C. L. REV. 245 (1951); Reys, *Discretionary Powers of the Board of Zoning Appeals*, 20 LAW & CONTEMP. PROB. 280 (1955); Rosenzweig, *From Euclid to Eastlake—Toward a Unified Approach to Zoning Change Requests*, 82 DICK. L. REV. 59 (1977); Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 S. CAL. L. REV. 548 (1965); Comment, *Variances in New York: A Trend Toward Flexibility*, 20 SYRACUSE L. REV. 628 (1969); Note, *Zoning Variances*, 74 HARV. L. REV. 1396 (1961); Note, *Variance Administration in Indiana—Problems and Remedies*, 48 IND. L.J. 240 (1973); Note, *Zoning Variances: The "Unnecessary Hardship" Rule*, 8 SYRACUSE L. REV. 85 (1956).
  8. ABA Committee on Planning and Zoning and Section of Local Government Law and Committee on Public Regulation of Land Use of Section of Real Property Law, Probate and Trust Law (Report), *Zoning Variance Criteria—*

the particular use or structure is not inconsistent with the public interest, and where strict enforcement of the relevant ordinance would result in unwarranted harm to the property owner.<sup>9</sup> The standard most often referred to in this regard is that of "unnecessary hardship."<sup>10</sup>

Some individuals have asserted that the primary purpose of the variance is "to benefit the community and the individual property owner by assuring that property capable of being put to commercial, industrial, or residential use will not lie idle."<sup>11</sup> It is said that

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*Viewpoints of Lawyers*, 8 REAL PROP., PROBATE & TRUST J. 33 (1973) [hereinafter cited as Committee Report].

9. The following is a list of requirements popularly cited as prerequisites to the granting of a variance:

(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Otto v. Steinhilber, 282 N.Y. 71, 76, 24 N.E.2d 851, 853 (1939).

10. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 7 (rev. ed. 1926). The standard of "unnecessary hardship" is taken from the Act. Neither the fact that a property owner may suffer a financial disadvantage or loss of certain benefits from the denial of a variance, nor the granting of a variance to a landowner similarly situated in the neighborhood are, in and of themselves, "unnecessary hardships." See 6 P. ROHAN, *supra* note 7, § 43.02; Note, SYRACUSE L. REV., *supra* note 7, at 87-88.

The majority of jurisdictions have concluded that a countervailing consideration, one that would typically justify a denial of a variance, occurs when the hardship is self-created. Nevertheless, it would appear that some inquiry would be made as to the nature of the landowner's actions. Note, SYRACUSE L. REV., *supra* note 7, at 87-88. For a more thorough discussion of standards and relevant considerations for granting variances in Nebraska, see § II-B of text *infra*.

11. Note, HARV. L. REV., *supra* note 7, at 1396. Utilization of the variance as a device for fostering the practical use of land has been the subject of considerable debate. Disadvantages of this form of relief allegedly include: (1) the fact that the standards typically employed are overly general and vague; (2) the nature of the relief appears to foster corruption; (3) judicial review is often hampered by the absence of discernible standards; (4) because the grant of a variance does not alter the ordinance, prospective purchasers are misled and their confidence is shaken, the public loses faith in the efficacy of the ordinance, and future development of the property is rendered uncertain; and (5) instances often arise when amendments to the ordinance may be more beneficial than the granting of piecemeal relief by way of individual variances. *Id.* at 1406. See 6 P. ROHAN, *supra* note 7, § 43.01[4]; Dallstream & Hunt, *supra* note 7, at 235-36; Gaylord, *supra* note 7, at 196-97; Shapiro, *supra* note 7. See also NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, AN ANALYSIS OF ZONING REFORMS: MINIMIZING THE INCENTIVE FOR CORRUPTION (1979) (variances "are often not understood by citizens, sometimes not by the

a true variance, unlike an exception or a special permit,<sup>12</sup> is designed to preserve the constitutionality of zoning legislation due to the avoidance of a confiscatory effect which would often result from slavish application of the ordinance to the private property involved.<sup>13</sup> There is, however, no legal right to a variance, and vested rights are not affected by either the denial or the grant of a variance.<sup>14</sup> Whether a variance will be granted ultimately will be

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boards and councils granting them, and in a few cases not by the courts." *Id.* at 4).

12. [A]n *exception* is a permission given by the board, properly authorized by ordinance in specific cases, for an applicant to use his property in a manner contrary to the provisions of an ordinance, provided such use subserves the general welfare and protects community interests. A *variance*, on the other hand, is an authorization by a board, usually on appeal, granting relief and doing substantial justice in the use of his property by a property owner, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship.

2 E. YOKLEY, *supra* note 7, § 15-4.

13. The purpose of a provision authorizing the granting of relief in a specific case of hardship is to permit the amelioration of the rigors of necessarily general regulations by eliminating the necessity of a slavish adherence to the precise letter of the limitations where in a given case little or no good on the one side and undue hardship on the other would result from a literal enforcement and to protect the ordinance against attack on the ground of unreasonable interference with private rights.

Peterson v. Vasak, 162 Neb. 498, 508, 76 N.W.2d 420, 426-27 (1956) (citing Lee v. Board of Adjustment, 226 N.C. 107, 37 S.E.2d 128 (1946); Annot., 168 A.L.R. 13 (1947)).

From the practical standpoint of a landowner or prospective purchaser, a variance may be considered more desirable than a request for a parcel rezoning or a constitutional challenge. The variance generally affords more immediate and less complicated relief. See § II-A of text *infra*. It is considerably less expensive, and more likely to be attained than is a judicial determination that the relevant zoning ordinance is invalid or unconstitutional. Moreover, society may benefit from the development of the variance form of relief. Among the justifications commonly asserted by its proponents are: (1) economic utilization of stagnating property; (2) constitutional considerations, including both the confiscation issue and the question of discriminatory application; and (3) prevention of illegal spot zoning, which is wholly preferable to new legislation which might weaken the uniformity and effectiveness of the zoning ordinance. 6 P. ROHAN, *supra* note 7, § 43.01[4]; Green, *supra* note 7; Reps, *supra* note 7.

14. 2 E. YOKLEY, *supra* note 7, § 15-5. However, it is interesting to note that another feature that distinguishes a variance from an exception is that some courts hold that the variance *creates* a vested right that runs with the land, while an exception is personal to the owner and terminates upon disposition of the property. 6 P. ROHAN, *supra* note 7, § 43.01[2][a]. Compare Balodis v. Fallwood Park Homes, Inc., 54 Misc. 2d 936, 283 N.Y.S.2d 497 (1967) (special exception terminates on sale) with County of Imperial v. McDougal, 19 Cal. 3d 505, 564 P.2d 14, 138 Cal. Rptr. 472 (1977) (special exception runs with the land).

determined on the basis of an analysis of the circumstances of each case.<sup>15</sup> In addition, zoning boards of appeal commonly have authority to attach reasonable conditions to the granting of a variance.<sup>16</sup> Imposition of such conditions is thought necessary in many cases in order to protect the intent of a community's comprehensive plan and achieve substantial justice while serving the interests of the individual landowners aggrieved by the ordinance.<sup>17</sup>

Zoning ordinances typically authorize two types of variances: *use* variances and *area* variances.<sup>18</sup> A use variance authorizes a use not normally permissible in the district of the situs, *e.g.*, a nursery in a residential district. Area variances, on the other hand, permit landowners to depart from dimension requirements, *e.g.*, height and setback restrictions. The standards of proof applied by courts on review will often differ depending on the type of variance requested. Consequently, characterization of the type of variance involved is an important consideration.<sup>19</sup>

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15. Alumni Control Bd., Inc. v. City of Lincoln, 179 Neb. 194, 137 N.W.2d 800 (1965); 2 E. YOKLEY, *supra* note 7, § 15-5.

16. Enabling legislation commonly allows for conditions to be imposed on the grant of special permits or exceptions. However, power to impose conditions in cases of variances must be inferred from statutory language or from the express provisions of a municipality's zoning ordinance. Such conditions must be reasonably calculated to achieve a legitimate objective of the zoning ordinance, and must be related to the purposes of zoning. Unnecessary, arbitrary, or unreasonable conditions, as well as those which are found to be vague or indefinite, will be invalidated. Finally, any conditions must attach to the land rather than to the owner personally. 6 P. ROHAN, *supra* note 7, § 43.03[2]. For a discussion of "conditional zoning", see § III-C of text *infra*.

17. Comment, *Zoning Amendments and Variances Subject to Conditions*, 12 SYRACUSE L. REV. 230 (1960).

18. While Nebraska statutes do not expressly categorize types of variances, the distinction is implicit. See NEB. REV. STAT. § 14-411 (Reissue 1977) (cities of metropolitan class); *id.* § 15-1106 (Reissue 1977) (cities of primary class); *id.* § 19-910 (Cum. Supp. 1980) (villages, cities of the first and second class); *id.* § 23-174.09 (Reissue 1977) (counties); note 76 *infra*.

19. In the language of the Nebraska Supreme Court:

*Use* variances are customarily concerned with "hardship" while *area* variances are customarily concerned with "practical difficulty." A use variance is one which permits a use other than that prescribed by the zoning ordinance in a particular district. An area variance has no relationship to a change of use. It is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance.

Alumni Control Bd., Inc. v. City of Lincoln, 179 Neb. 194, 195-96, 137 N.W.2d 800, 802 (1965) (emphasis added). See 6 P. ROHAN, *supra* note 7, § 43.01[2].

The jurisdictions are divided on their approach to the application of standards of review regarding area and use variance requests. While some refuse to recognize any distinctions of review between the type of variance requested, a higher degree of proof is often required for *use* variances. This distinction is typically justified due to the peculiarly greater impact use variances are thought to have on the community. 6 P. ROHAN, *supra* note 7,

State enabling legislation and local zoning ordinances provide general requirements for obtaining a variance.<sup>20</sup> However, it is generally agreed that the applicant must meet certain broad conditions. First, the applicant must have "a legal interest in the property, or at a minimum have an option to purchase or a binding contract to acquire such an interest."<sup>21</sup> Moreover, the applicant's hardship must be related to his possession of the land or a legal interest in it.<sup>22</sup> Courts typically require that the difficulties en-

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§ 43.01[2]. A minority of jurisdictions impose a strict "unnecessary hardship" standard to all requests for use variances, while imposing a "practical difficulties" test to requests for area variances. *Id.* As evidenced by the *Alumni Control Bd.* decision, the Nebraska Supreme Court seems to have adopted this position.

In *Alumni Control Bd.*, the Nebraska Supreme Court expounded upon the standards applicable to a situation in which a request was made for what was, in part, an area variance. After a discussion in which the court distinguished use and area variances and their respective standards, the court stated:

The criteria generally and properly before a board of appeals on an application for a variance from area restrictions of a zoning code are: (1) Whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk, or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2) whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and (3) whether relief can be granted in such a fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

179 Neb. at 196-97, 137 N.W.2d at 802 (citing 2 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 45-28 (3d ed. 1956)). See notes 60-76 & accompanying text *infra*.

20. See § II-A of text *infra*.

21. 6 P. ROHAN, *supra* note 7, § 43.02[1]. At least one commentator would not limit the extent of standing granted an option holder. The argument is that even the holder of an option to purchase land should qualify notwithstanding the fact that he is not bound to exercise the option. Since the purchaser may be allowed to use a variance granted his seller, allowing him to obtain the variance directly would further the reasonable use of the property. "An option holder or even a prospective purchaser without an option would be encouraged to buy and use the property if prior to purchase he were permitted to ask for and receive a variance." Note, HARV. L. REV., *supra* note 7, at 1398. For a full discussion of the standing issue, see notes 41-45 & accompanying text *infra*.

22. *Cf. Garibaldi v. Zoning Bd. of Appeals*, 163 Conn. 235, 239-40, 303 A.2d 743, 745 (1972) ("Personal hardships, regardless of how compelling or how far beyond the control of the individual applicant, do not provide sufficient grounds for the granting of a variance."); *Alumni Control Bd., Inc. v. City of Lincoln*, 179 Neb. 194, 198, 137 N.W.2d 800, 803 (1965) ("The mere fact that the plaintiff would like to have a fraternity house of larger dimensions does not establish

countered must not be self-created.<sup>23</sup> The petitioning landowner or interest holder must show that his situation is unique and distinct from adjoining landowners.<sup>24</sup> Finally, in conjunction with the public interest requirement, the proposed use must not operate to change the essential character of the neighborhood.<sup>25</sup>

### A. Procedure for Granting Variances

Pursuant to Nebraska enabling legislation, cities, towns, villages, or counties that enact zoning legislation are authorized to create entities called "boards of adjustment."<sup>26</sup> Metropolitan cities<sup>27</sup> and cities of the primary class<sup>28</sup> are empowered to create "boards of appeal."<sup>29</sup> In villages, the local legislative body is

practical difficulty in complying with the ordinance." See 6 P. ROHAN, *supra* note 7, § 43.02[1]; 2 E. YOKLEY, *supra* note 7, § 15-12.

23. *E.g.*, *Abel v. Zoning Bd. of Appeals*, 172 Conn. 286, 374 A.2d 227 (1977); *Board of Zoning Appeals v. Waskelo*, 240 Ind. 594, 168 N.E.2d 72 (1960); *Bienz v. City of Dayton*, 29 Or. App. 761, 566 P.2d 904 (1977). Several jurisdictions have adopted liberal approaches in cases of prior knowledge of hardship conditions before acquisition of the property, and in cases of self-created hardships involving requests for area variances. 6 P. ROHAN, *supra* note 7, § 43.02[2][f].
  24. *E.g.*, *City of Little Rock v. Kaufman*, 249 Ark. 530, 460 S.W.2d 88 (1970); *Peterson v. Vasak*, 162 Neb. 498, 76 N.W.2d 420 (1956); *Hankin v. Zoning Hearing Bd.*, 384 A.2d 1386 (Pa. Commw. Ct. 1978). See 6 P. ROHAN, *supra* note 7, § 43.02[2][c], wherein the author cites a number of circumstances which may satisfy the uniqueness test:
    - (1) where the property borders on a less restricted district, especially where the adjoining use is incompatible to that maintained by the applicant;
    - (2) where the land is located in a transition neighborhood, and the cumulative effect of the deteriorating area and confiscatory nature of the zoning restrictions is to exacerbate the landowner's hardship;
    - (3) where the property is unable to produce any income because its buildings or structures are obsolete or in a dilapidated condition; and
    - (4) where the property is located near significantly conflicting uses.
- Id.* (footnotes omitted). See also 2 E. YOKLEY, *supra* note 7, § 15-9; note 54 & accompanying text *infra*.
25. *E.g.*, *Alumni Control Bd., Inc. v. City of Lincoln*, 179 Neb. 194, 137 N.W.2d 800 (1965) (relief granted only when spirit of the ordinance will be observed). This is simply a recognition of the importance given the underlying purposes of zoning. See generally, 2 E. YOKLEY, *supra* note 7, § 15-10; *Kratovil, Zoning: A New Look*, 11 CREIGHTON L. REV. 433 (1977).
  26. NEB. REV. STAT. § 19-907 (Cum. Supp. 1980) (villages, cities of the first and second class); *id.* § 23-168.01 (Cum. Supp. 1980) (counties).
  27. A city of the metropolitan class has 300,000 inhabitants or more. *Id.* § 14-101 (Reissue 1977).
  28. A city of the primary class has from 100,001 to 299,999 inhabitants. *Id.* § 15-101 (Reissue 1977).
  29. *Id.* § 14-408 (Reissue 1977) (cities of metropolitan class); *id.* § 15-1106 (Reissue 1977) (cities of the primary class).



granted power to serve in this capacity.<sup>30</sup> Unlike boards of primary class cities, those in cities of the first,<sup>31</sup> second,<sup>32</sup> and metropolitan class, and those in villages have rules and procedures prescribed by statute.<sup>33</sup>

Municipal boards have authority to hear appeals from administrative decisions.<sup>34</sup> Special exceptions to the terms of relevant ordinances may be heard and decided by villages and cities of the first and second class,<sup>35</sup> while cities of the primary or metropolitan class may decide all matters provided in the statute.<sup>36</sup> Special permits may be granted by a metropolitan board of appeals to the state, a political subdivision, or a public utility for public service purposes subject to the imposition of necessary and proper conditions.<sup>37</sup>

Appeals to a board are generally taken from a refusal by a city official to issue a building permit.<sup>38</sup> As noted previously, in order to have standing to request a variance, the applicant must have a legally cognizable interest in the property in question.<sup>39</sup> However, some jurisdictions have granted standing to a lessee,<sup>40</sup> an owner's agent, an owner's assignee, or other interested party.<sup>41</sup> In at least two cases, the courts have indicated a desire to depart altogether

30. *Id.* § 19-911 (Cum. Supp. 1980).

31. A city of the first class has from 5,001 to 100,000 inhabitants. *Id.* § 16-101 (Reissue 1977).

32. A city of the second class includes cities, towns, and villages of from 801 to 5,000 inhabitants. *Id.* § 17-101 (Reissue 1977).

33. *See id.* § 14-408 (Reissue 1977) (cities of metropolitan class); *id.* § 19-908 (Reissue of 1977) (villages, cities of the first and second class). A village includes any town or village of not less than 100 nor more than 800 inhabitants incorporated under Nebraska law as a city, town or village, or any second class city which has a village form of government. *Id.* § 17-201 (Reissue 1977).

34. NEB. REV. STAT. § 14-409 (Reissue 1977) (cities of metropolitan class); *id.* § 15-1106 (Reissue 1977) (cities of the primary class); *id.* § 19-910 (Cum. Supp. 1980) (villages, cities of the first and second class).

35. *Id.* § 19-910 (Cum. Supp. 1980).

36. *Id.* § 14-409 (Reissue 1977) (cities of metropolitan class); *id.* § 15-1106 (Reissue 1977) (cities of the primary class).

37. *Id.* § 14-412 (Reissue 1977).

38. *E.g.*, Alumni Control Bd., Inc. v. City of Lincoln, 179 Neb. 194, 137 N.W.2d 800 (1965) (case involved application for a building permit requiring a variance).

39. *See note 21 supra.*

40. *E.g.*, Finn v. Municipal Council, 136 N.J.L. 34, 53 A.2d 790 (1947); Poster Advertising Co. v. Zoning Bd. of Adjustment, 408 Pa. 248, 182 A.2d 521 (1962); Ralston Purina Co. v. Zoning Bd., 64 R.I. 197, 12 A.2d 219 (1940).

41. *E.g.*, Cohn v. County Bd. of Supervisors, 135 Cal. App. 2d 180, 286 P.2d 836 (1955) (assignee); Stout v. Jenkins, 268 S.W.2d 643 (Ky. 1954) (agent); Slater v. Toohill, 276 A.D. 850, 93 N.Y.S.2d 153 (1949) (purchaser of property under an agreement conditioned upon procurement of variance).

from the "legal interest" requirement.<sup>42</sup> This seems to be the better rule since it would tend to further the reasonable use of property.<sup>43</sup>

The procedure prescribed by the Municipal Code of Lincoln, Nebraska, is typical of procedures used by zoning boards of appeals.<sup>44</sup> Under the provisions of Lincoln's recently amended comprehensive zoning ordinance, the decision of the superintendent for codes administration (building official) must be made in writing.<sup>45</sup> Following that decision, any appeal must be taken within sixty days by filing a notice of appeal with the superintendent specifying the grounds.<sup>46</sup> Then, the superintendent transfers all documents constituting the record to the board.<sup>47</sup> Upon receipt of the appeal, the board must set a reasonable time for a hearing within thirty days.<sup>48</sup> Notice must be posted in a conspicuous place visible from the street on or near the property upon which the action is pending for at least eight days prior to public hearing<sup>49</sup> and notice of the time, place, and subject matter of the public hearing must be published by the city clerk in a daily newspaper of general circulation in the city.<sup>50</sup> Any other notice deemed appropriate by the public body, although neither mandatory nor a condition precedent to any hearing, may also be required.<sup>51</sup>

## B. Standards

### 1. Villages, Cities of the First and Second Class

Nebraska law provides that villages and cities of the first and second class may grant a variance for "peculiar and exceptional practical difficulties . . . or exceptional and undue hardships."<sup>52</sup> If

42. Board of Zoning Appeals v. Moyer, 108 Ind. App. 198, 27 N.E.2d 905 (1940); Tramonti v. Zoning Bd. of Review, 93 R.I. 131, 172 A.2d 93 (1961).

43. See Note, HARV. L. REV., *supra* note 7, at 1398; note 21 *supra*. For a general overview of the standing issue in variance cases, see Annot., 89 A.L.R.2d 663 (1963).

44. LINCOLN, NEB., CODE § 27.75.030 (1979).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* § 27.81.050.

50. *Id.*

51. *Id.*

52. NEB. REV. STAT. § 19-910 (Cum. Supp. 1980). Under this provision, the board of adjustment shall grant a variance under the following standard:

[w]here by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the zoning regulations, or by reason of exceptional situation or condition of such piece of property, *the strict application of any enacted regulation under this act would result in peculiar and exceptional practical*

relief may be granted without injury to the public welfare and without substantially impairing the intent or purpose of any ordinance,<sup>53</sup> a variance will be granted *only* if the board finds that:

- (a) The strict application of the zoning regulation would produce undue hardship;
- (b) such hardship is not shared generally by other properties in the same zoning district and the same vicinity;
- (c) the authorization of such variance will not be of substantial detriment to adjacent property and the character of the district will not be changed by the granting of the variance; and
- (d) the granting of such variance is based upon reason of demonstrable and exceptional hardship as distinguished from variations for purposes of convenience, profit or caprice.<sup>54</sup>

As if the above criteria are not sufficiently restrictive to limit the indiscriminate granting of variances, a further provision is made that unless the board finds that the condition or intended use of the property involved is not so general or recurring in nature that an amendment to the ordinance would be justified, a variance application will be denied.<sup>55</sup>

## 2. *Cities of the Primary Class*

A city of the primary class is given power to grant a variance for "peculiar, exceptional, and unusual circumstances" not generally found in the area concerned.<sup>56</sup> The statute sets forth no list of fac-

*difficulties to or exceptional and undue hardships* upon the owner of such property . . . .

*Id.* (emphasis added).

53. *Id.* Again, this is the codification of a primary tenet in zoning law: a variance will not be granted if it is in derogation of the spirit, intent and general plan of the applicable zoning ordinance. *Alumni Control Bd., Inc. v. City of Lincoln*, 179 Neb. 194, 198, 137 N.W.2d 800, 803 (1965).
54. NEB. REV. STAT. § 19-910 (Cum. Supp. 1980).
55. *Id.* This provision is in harmony with the general rule that an amendment of an ordinance under the guise of a variance is prohibited. *City of Lincoln v. Foss*, 119 Neb. 666, 230 N.W. 592 (1930). See 2 E. YOKLEY, *supra* note 7, § 15-13.
56. NEB. REV. STAT. § 15-1106 (Reissue 1977). The Lincoln Municipal Code closely follows the wording of the statute:

The jurisdiction of the board of zoning appeals shall be limited to the following:

(b) Powers relative to variances. To hear and decide upon petitions for variances and, subject to such standards, principles, and procedures provided in this title, to vary the strict application of the height, area, parking, or density requirements to the extent necessary to permit the owner a *reasonable use* of the land in those specified instances where there are peculiar, exceptional, and unusual circumstances in connection with a specific parcel of land, which circumstances are not generally found within the locality or neighborhood concerned.

LINCOLN, NEB., CODE § 27.75.040 (1979) (emphasis added).

The importance of the "reasonable use" language which appears in the

tors similar to those provided for villages, cities of the first and second class, and counties. Whether or not a given landowner comes within the "peculiar, exceptional, or unusual circumstances" language would appear to be solely within the discretion of the board, subject only to the "standards and procedures"<sup>57</sup> provided in the zoning ordinance as a whole.<sup>58</sup> However, one decision by the Nebraska Supreme Court aids one in understanding how such a determination is made, and how courts will approach the decision on review.<sup>59</sup>

*Alumni Control Board v. City of Lincoln*<sup>60</sup> involved an appeal from a denial of an application for a building permit requiring a variance in front, rear, and side yard requirements, and in off-street parking requirements of the Lincoln zoning ordinance. The owner's position was that it was not economically feasible to construct a fraternity house for less than forty-eight men—the practical result of the restrictions imposed by the ordinance.<sup>61</sup> This fact, together with the requirements of the University of Nebraska's housing code, was asserted by the plaintiff as constituting "practical difficulties" sufficient to require the granting of a variance.<sup>62</sup>

The court found that "practical difficulties" was an appropriate standard for weighing the applicant's request for an *area* variance, *i.e.*, the question regarding the front, rear, and side yard requirements.<sup>63</sup> Following a discussion of the criteria relevant to an application of this type,<sup>64</sup> the court held that the action of the board and

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Lincoln Code and the statute was made apparent in the *Alumni Control Bd.* case. A reasonable use of property may be very broadly defined. If the applicant's use at the time of his request is "reasonable", there is no requirement to grant the variance.

The restrictions of the ordinance do not prevent the property from being used for any of the other authorized uses permitted in the district. There is essentially no difference here from any case in which an owner desires to expand, but finds himself with not enough property to do so and also meet the conditions of the ordinance.

179 Neb. 194, 198, 137 N.W.2d 800, 803 (1965).

57. NEB. REV. STAT. § 15-1106 (Reissue 1977).

58. *Id.*

59. *Alumni Control Bd., Inc. v. City of Lincoln*, 179 Neb. 194, 137 N.W.2d 800 (1965).

60. *Id.*

61. A 30 by 60 feet, four-story building was proposed. Under the provisions of the zoning code, the maximum building size allowed on the property zoned F-restricted commercial was 28 by 48.6 feet. However, a house built in compliance with both the city zoning code and the University housing code would only accommodate 36 men. *Id.* at 195, 137 N.W.2d at 801.

62. *Id.*

63. By drawing a distinction between the standards used when analyzing use and area variances, the Nebraska Supreme Court has sided with the minority position in the United States. See note 19 & accompanying text *supra*.

64. See note 19 *supra*.

the city council in denying the requested variance was not unreasonable, arbitrary, or illegal.<sup>65</sup> The court found that: (1) unlike the majority of cases in which courts have found "practical difficulties", this case did not involve a substandard lot;<sup>66</sup> (2) there was no evidence that the reasons constituting the plaintiff's claim of practical difficulty were unique to the property;<sup>67</sup> (3) the ordinance did not prevent the property from being used for any other authorized uses permitted in the district;<sup>68</sup> (4) even if the issue of "practical difficulty" was conceded, the area requirements were reasonable;<sup>69</sup> (5) granting the variance would have been in derogation of the spirit, intent, and plan of the ordinance;<sup>70</sup> (6) the application was opposed by adjoining landowners and substantial justice would not be done to them;<sup>71</sup> and (7) the acts of the board were not an abuse of discretion or unreasonable, arbitrary, or illegal.<sup>72</sup>

The off-street parking issue prompted an interesting approach by the court. Since this aspect involved a variance of a hybrid nature, technically involving both *use* and *area* restrictions, the court apparently analyzed the circumstances under both the "unnecessary hardship" standard commonly invoked in instances involving *use* variances, and the "practical difficulties" standard applicable to the question of *area* variances.<sup>73</sup> The court concluded that there was "no evidence of practical difficulty, nor unnecessary hardship, nor, in fact, of any other reason why the ordinance cannot be specifically complied with."<sup>74</sup>

As a result of the *Alumni Control Board* decision, it would ap-

65. 179 Neb. at 200, 137 N.W.2d at 804. The scope of review in a case involving a *denial* of a request for a variance is generally thought to be extremely limited. *E.g.*, *Speedway Bd. of Zoning Appeals v. Standard Concrete Materials, Inc.*, 150 Ind. App. 363, 276 N.E.2d 589 (1971). However, in Nebraska the scope of review in decisions granting a variance would appear to be very similar to that in decisions denying a variance. *Cf. Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958) (board's decision to *grant* variance will not be disturbed unless it is found to be illegal, or from standpoint of fact is not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong).

66. 179 Neb. at 196, 137 N.W.2d at 802. Courts are more likely to grant relief in cases of substandard lots because often no "reasonable use" could otherwise be made of the parcel, and because the granting of a variance would usually pose no threat to neighboring property. 6 P. ROHAN, *supra* note 7, § 43.02[3] (citing *Wilcox v. Zoning Bd. of Appeals*, 17 N.Y.2d 249, 217 N.E.2d 633, 270 N.Y.S.2d (1966)).

67. 179 Neb. at 197, 137 N.W.2d at 802. *See* note 24 & accompanying text *supra*.

68. 179 Neb. at 198, 137 N.W.2d at 803.

69. *Id.* *See* note 56 *supra*.

70. 179 Neb. at 198, 137 N.W.2d at 803. *See* note 53 & accompanying text *supra*.

71. 179 Neb. at 198, 137 N.W.2d at 803.

72. *Id.* at 200, 137 N.W.2d at 804. *See* note 65 *supra*.

73. *See* note 19 *supra*.

74. 179 Neb. at 199, 137 N.W.2d at 803.

pear that, notwithstanding the absence of statutory language prescribing the "practical difficulties" standard for cases involving area variances within a city of the primary class, reviewing courts will be free to adopt this standard and its accompanying criteria. Furthermore, in all classes of cities, and in villages and counties in which requests for *area* variances are concerned, the "practical difficulties" test would apparently apply. This approach is arguably more appropriate in those cases involving cities of the metropolitan class, villages, and cities of the first and second class due to the presence of "practical difficulties" language in the relevant statutes.<sup>75</sup> Nevertheless, the statutes collectively neither make the *use-area* distinction, nor expressly require the application of different standards.<sup>76</sup> *Alumni Control Board* also appears to stand implicitly for the proposition that *use* variances are recognized as valid in Nebraska.

### 3. *Cities of the Metropolitan Class*

A city of the metropolitan class may allow a variance in cases of "practical difficulties or unnecessary hardships."<sup>77</sup> Like statutes in other jurisdictions, this provision neither defines the phrase "unnecessary hardship," nor attempts to qualify its breadth through the addition of relevant factors to be considered.<sup>78</sup> Its application in each instance is left to the wise discretion of the proper authorities, partly because the language does not readily lend itself to precise definition. Moreover, it could be argued that any attempt to do so would risk resolving wholly distinct cases in similar fashion.<sup>79</sup>

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75. NEB. REV. STAT. § 14-411 (Reissue 1977) (metropolitan class: "practical difficulties or unnecessary hardships"); *id.* § 19-910 (Cum. Supp. 1980) (villages, cities of first and second class: "peculiar and exceptional practical difficulties . . . or exceptional and undue hardships").

76. One could argue that the statutes do, in fact, make reference to variances granted on the basis of both *area* and *use* restrictions. In NEB. REV. STAT. § 14-411 (Reissue 1977) (cities of the metropolitan class), the relevant language is as follows: "the board of appeals shall have the power . . . , to vary the application of any . . . ordinance relating to the *use, construction or alteration* of buildings or structures or the use of land . . . ." (emphasis added). The Board of Zoning Appeals in Lincoln, Nebraska, has construed its enabling legislation as precluding the power to grant use variances. However, granting area variances appears to be a fairly common practice. For example, between January and September of 1980, only 9 of the 50 variance requests filed with the Board were denied. Interview with V.C. Seth, Planning Department of Lincoln, in Lincoln, Nebraska (Sept. 15, 1980).

77. NEB. REV. STAT. § 14-411 (Reissue 1977).

78. *See id.*

79. A report of the Committee on Planning and Zoning of Section of Local government Law and Committee on Public Regulation of Land Use of Section of Real Property, Probate and Trust Law of the ABA cites a questionnaire sent to committee members which asked them to express their views on whether

## Notwithstanding the legislature's apparent reluctance to define

or not the standards of "practical difficulties" or "unnecessary hardship" were appropriate, too broad, or too restrictive. A slight majority believed that the standards were too broad. Committee Report, *supra* note 8, at 34. The following is a list of suggested criteria furnished by participants:

A. Practical difficulties or unnecessary hardship including where strict enforcement will cause needless expense, difficulty or hardship without serving any useful public purpose or where the grant of a variance will be in the best interests of the neighborhood or community.

B. (1) The property in question cannot yield a reasonable return if used under the conditions allowed by the regulations in that zone;

(2) The plight of the landowner is due to unique circumstances not created by the landowner; and

(3) The variance, if granted will not alter the essential character of the locality.

A variance shall be permitted only if the evidence, in the judgment of the designated authority, sustains each of the three conditions enumerated. The governing body may provide general or specific rules implementing, but not inconsistent with, the rules herein provided to govern determinations of the designated authority . . . . A variance shall not be granted which will permit the establishment of a use not permitted in the particular district.

C. (3) The practical difficulty or unnecessary hardship is caused by this ordinance and has not been created by intentional action of any person presently having an interest in the property.

(7) The granting of the variance will not impair an adequate supply of light and air to adjacent property, or overcrowd the land, or create an undue concentration of population, or substantially increase the congestion of the streets, or create hazardous traffic conditions, or increase the danger of fire, or otherwise endanger the public safety.

(8) The variance will not adversely affect transportation or unduly burden water, sewer, school, park or other public facilities. (Baltimore, Md., Zoning Ordinance).

D. Variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. (*Cal. Government Code* § 69506).

E. (a) That there are special circumstances or conditions ap-

the standard,<sup>80</sup> the Nebraska Supreme Court has shed some light on the subject through its decision in *Peterson v. Vasak*.<sup>81</sup> *Peterson* involved the denial of an application to the Building Department of the City of Omaha, Nebraska, for a certificate of occupancy in order to improve upon an irregularly shaped triangular tract containing 13,619 square feet in a residential zone.<sup>82</sup> The applicable ordinance required 20,000 square feet for a single family dwelling and also contained setback and side yard requirements which,

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plying to the land, building or use referred to in the application and which do not apply to other properties in the district; and

(b) That such special circumstances were not created by the owner or applicant; and

(c) That the authorizing of the variance is necessary for the preservation and enjoyment of substantial property rights; and

(d) That the authorizing of the application will not be materially detrimental to the persons residing or working in the vicinity, to adjacent property, to the neighborhood, or to the public welfare in general. (*Phoenix, Ariz., Zoning Ordinance*).

*Id.* at 36-37.

80. While legislation provides criteria for determining whether or not to grant a variance regarding villages, cities of the first and second class and counties, it is not known whether or not these factors will apply for all standards in all statutes enabling boards of appeal to grant variances. See note 54 & accompanying text *supra*. A study undertaken in Nebraska suggested several factors which should be considered prior to granting a variance:

- a. That the applicant has shown the premises cannot reasonably be used in conformity with the regulations;
- b. That the difficulty or hardship alleged relates solely to the premises involved and not to other premises of the applicant;
- c. That the difficulty or hardship arises from the application of the regulations and not from some act of the applicant or someone acting in his behalf;
- d. That the difficulty or hardship relates only to the premises involved and not to some factor which applies equally to all other land in the same zone classifications;
- e. That the difficulty or hardship is something more than mere financial loss to the applicant;
- f. That the particular variance is not expressly prohibited or excluded by the regulations;
- g. That the permission requested refers to a use of or structure on the land itself and not to some use or structure which the applicant can have, but others may not have;
- h. If the Board has had a previous hearing concerning the same use of the same premises, then it does not hold a rehearing without an allegation in the application and proof at the hearing that there has been a change of conditions affecting that same property since the prior decision or that other considerations materially affecting the merits of the subject matter have intervened and no vested rights have arisen in the meantime.

Coupland, *Rural Zoning in Nebraska*, 54 NEB. L. REV. 586, 597 (1975) (footnote omitted).

81. 162 Neb. 498, 76 N.W.2d 420 (1956).

82. *Id.* at 504, 76 N.W.2d at 425.



under the circumstances, made compliance impossible.<sup>83</sup> Conceding that the limitations and requirements of the ordinance had the practical economic effect of rendering the land unusable and generally valueless, the court reversed and remanded the decision, and ordered the City Board to issue the certificate on the grounds of "unnecessary hardship".<sup>84</sup> The court stated the relevant considerations under the standard:

The criterion of unnecessary hardship is that the use restriction, viewing the property in the setting of its environment, is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private property; or that there is convincing proof that it is impossible to use the property for a conforming purpose; or that there are factors sufficient to constitute such a hardship that would in effect deprive the owner of his property without compensation. An unnecessary hardship exists when all the relevant factors taken together convince that the plight of the location concerned is unique in that it cannot be put to a conforming use because of the limitations imposed upon the property by reason of its classification in a specific zone.<sup>85</sup>

The court found that the circumstances showing a deprivation of value and use of the landowner's property established an instance of unnecessary hardship specifically contemplated as being within the coverage of the statute.<sup>86</sup> Consequently, *Peterson* would appear to stand as a definitive judicial statement on the type of circumstances required to come under the unnecessary hardship standard in Nebraska.

#### 4. Counties

County boards are required by law to appoint a board of adjustment.<sup>87</sup> Members of the board of adjustment cannot serve on the county board of commissioners or county board of supervisors.<sup>88</sup> Subject to conditions and safeguards established by the county board, the board of adjustment may grant a variance in cases of "peculiar and exceptional practical difficulties . . . or exceptional and undue hardships."<sup>89</sup> In all relevant aspects the statutory requirements are identical to those requirements prescribed for villages, and cities of the first and second class, and the statute also lists mandatory findings as a condition of granting a variance.<sup>90</sup>

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83. *Id.* at 505, 76 N.W.2d at 426.

84. *Id.* at 510, 76 N.W.2d at 427.

85. *Id.* at 508, 76 N.W.2d at 426.

86. *Id.* at 510, 76 N.W.2d at 427.

87. NEB. REV. STAT. § 23-168.01 (Cum. Supp. 1980).

88. *Id.*

89. *Id.* § 23-168.03 (Cum. Supp. 1980).

90. *Id.* See note 54 & accompanying text *supra*.

### C. Judicial Review

Generally, persons "aggrieved" by any decision of the zoning board may seek *de novo* review in the district court.<sup>91</sup> Aggrieved parties have been held to include neighboring property owners who are able to prove that denial of a variance application has caused a depreciation in value of their property or, conversely, that the granting of a variance has significantly impaired enjoyment of their property.<sup>92</sup> However, it has been asserted that any taxpayer, officer, department, board, or bureau of the municipality should have standing to petition for review.<sup>93</sup>

It has been held in Nebraska that once granted, a variance from an applicable zoning ordinance is presumed to be legal and correct until rescinded, amended or reversed by a court of competent jurisdiction.<sup>94</sup> This presumption is attributable, in part, to the fact that a determination as to what serves the public interest in relation to zoning ordinances affecting the use of property is primarily within the peculiar discretion of the zoning board.<sup>95</sup> As a result, the board's decision will typically not be disturbed "unless it is found to be illegal, or from standpoint of fact not supported by evidence, or is arbitrary and unreasonable, or is clearly wrong."<sup>96</sup> Thus, judicial review has a limited function in this area.<sup>97</sup>

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91. *Id.* §§ 14-413 to -414 (Reissue 1977) (cities of the metropolitan class); *id.* §§ 15-1201 to -1205 (Reissue 1977) (cities of the primary class); *id.* § 19-912 (Reissue 1977) (villages, cities of the first and second class); *id.* § 23-168.04 (Reissue 1977) (counties). *Cf.* *Roncka v. Fogarty*, 152 Neb. 467, 41 N.W.2d 745 (1950) (under home rule charter, persons jointly or severally aggrieved by decision of zoning board may petition district court for review).

92. Note, HARV. L. REV., *supra* note 7, at 1400. *Cf.* *Bagley v. Sarpy County*, 189 Neb. 393, 202 N.W.2d 841 (1972) (plaintiffs had standing as landowners in Douglas County in order to challenge a rezoning resolution passed by the county board of Sarpy County on ground that the county had failed to adopt a comprehensive development plan).

93. Note, HARV. L. REV., *supra* note 7, at 1400 (citing *Standard State Enabling Act* § 7).

94. *Adler v. Lynch*, 415 F. Supp. 705 (D. Neb. 1976).

95. *Graham v. Graybar Elec. Co.*, 158 Neb. 527, 63 N.W.2d 774 (1954); *City of Omaha v. Glissman*, 151 Neb. 895, 39 N.W.2d 828, *appeal dismissed*, 339 U.S. 960 (1949).

96. *Weber v. City of Grand Island*, 165 Neb. 827, 829, 87 N.W.2d 575, 577-78 (1958).

97. 6 P. ROHAN, *supra* note 7, § 43.01[3]; Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform*, 12 U.C.L.A. L. REV. 937 (1965); note 65 *supra*. *Cf.* *City of Imperial v. Raile*, 187 Neb. 404, 191 N.W.2d 442 (1971) (although applicant for variance which was denied claimed that others had been granted variances under similar circumstances, evidence was sufficient to support determination that application of the zoning ordinance to the landowner was not arbitrary or discriminatory).

### III. PARCEL REZONING OR AMENDMENT

Those who do not wish to seek relief from zoning restrictions through application for a use variance or a special use permit may seek rezoning of their lot to a less restrictive use by applying to the local legislative body for an amendment to the zoning ordinance.<sup>98</sup> As a general rule, because rezoning is a legislative act<sup>99</sup> calling for legislative judgment and the exercise of police power, any amendment must pass constitutional scrutiny similar to that required of an original zoning enactment.<sup>100</sup> At the same time, the presumption of validity which attaches to the original zoning legislation applies with equal force to an amendment.<sup>101</sup>

In short, an amendment is an ordinance. The local governing body is authorized by the enabling act under which the original ordinance was adopted to change the substantive or procedural requirements of the existing law by amendment.<sup>102</sup> However, this power may not be exercised in an arbitrary, capricious or discriminatory manner.<sup>103</sup>

Substantive amendments may involve either the classification of property in a different zone<sup>104</sup> or a change made in the uses permitted in a particular zone.<sup>105</sup> The former is the more common

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98. For the amendment procedures provided by statute in Nebraska, see NEB. REV. STAT. § 14-405 (Reissue 1977) (cities of the metropolitan class); *id.* § 15-1105 (Reissue 1977) (cities of the primary class); *id.* § 19-905 (Reissue 1977) (villages, cities of the first and second class); *id.* § 23-165 (Reissue 1977) (counties).
  99. Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972). The majority rule appears to be that amendment procedures reflect a legislative function. However, a minority of jurisdictions follow a rule that rezoning is a quasi-judicial or administrative function requiring notice and hearing. See *Fasano v. County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); 6 P. ROHAN, *supra* note 7, § 39.01; Freilich, *Fasano v. Board of County Commissioners of Washington County: Is Rezoning an Administrative or Legislative Function?*, 6 URB. L. at vii (1974).
  100. See *Holmgren v. City of Lincoln*, 199 Neb. 178, 256 N.W.2d 686 (1977); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963).
  101. See *Bucholz v. City of Omaha*, 174 Neb. 862, 868-69, 120 N.W.2d 270, 275 (1963) ("Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control").
  102. In Nebraska, for example, cities of the primary class are given this power under NEB. REV. STAT. § 15-1105 (Reissue 1977). For an example of an ordinance reflecting this power, see LINCOLN, NEB., CODE § 27.81.040 (1979). *Cf.* *Hansen v. City of Norfolk*, 201 Neb. 352, 359, 267 N.W.2d 537, 539 (1978) ("a zoning ordinance may be amended from time to time as new and changing conditions warrant revision").
  103. *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950).
  104. See *Holmgren v. City of Lincoln*, 199 Neb. 178, 256 N.W.2d 686 (1977) (change in zoning classification from Class A-2 single family dwelling district to class C multiple dwelling district); § III-B-1 of text *infra*.
  105. See notes 107-08 & accompanying text *infra*.

type of amendment.<sup>106</sup> This would include, for example, the zoning of a once commercially zoned parcel for residential uses—thus, changing only the face of the zoning map. A change in use, on the other hand, is the least popular type of amendment.<sup>107</sup> An amendment of this sort involves a direct alteration of the text of the ordinance. The addition of a service station use to the existing uses allowed in a residential zone would be an example.<sup>108</sup>

In *Euclid v. Ambler Realty Co.*,<sup>109</sup> the Supreme Court established the constitutional validity of municipal zoning.<sup>110</sup> Specifically, the Court held that a zoning ordinance will be upheld if it is reasonable and within the scope of the police power.<sup>111</sup> In an attempt to delineate the scope of the police power, the Court broadly held that in order for an amendment to pass constitutional scrutiny it must be in the interest of the health, safety, convenience, morals, and general welfare of the community as a whole.<sup>112</sup> Under this standard, it has been held that a city rezoning ordinance designed to permit construction of apartment houses accommodating 400 units per city block in an area previously zoned to hold apartments with a 30 unit maximum was an unreasonable and arbitrary exercise of the zoning power.<sup>113</sup>

The general rule is that "a zoning ordinance may be amended from time to time as new and changing conditions warrant revision."<sup>114</sup> Among the factors that have been considered by local governing bodies in determining the extent of changed conditions are:<sup>115</sup> (1) whether the area to be rezoned exhibits a real need for a new use;<sup>116</sup> (2) whether the existing zone classification has re-

106. 6 P. ROHAN, *supra* note 7, § 39.02.

107. *Id.*

108. The possible application of this kind of amendment is often overlooked. Suppose, for example, a laundromat is permitted in commercial zones but not in local business zones. The property on which an owner intends to operate a laundromat is zoned local business. It may be easier to have the ordinance amended to allow laundromats in local business zones than it would be to have the property zoned commercial.

*Id.*

109. 272 U.S. 365 (1926).

110. Note, *Zoning Growth Controls for the General Welfare*, 55 NEB. L. REV. 523, 527 (1976).

111. 272 U.S. at 395.

112. *Id.*

113. *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950).

114. *Hansen v. City of Norfolk*, 201 Neb. 352, 359, 267 N.W.2d 537, 541 (1978). *Accord*, *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964).

115. N. STEUBEN, *REAL ESTATE PLANNING* 253 (1974).

116. Due to the contemporary approach to urban development, residential tracts are often rezoned to allow construction of shopping centers. One example of this occurred in *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963). The plaintiffs in *Bucholz* argued that the rezoning was illegal because the

sulted in the complete loss of value of the land;<sup>117</sup> (3) whether the site is near other rezoned property in the same use district or is located near other less restrictive use zones;<sup>118</sup> (4) whether the area will be used by a public utility;<sup>119</sup> (5) whether increased traffic notably affects the area, or it is located on existing transportation routes;<sup>120</sup> and (6) whether rezoning will have a favorable impact on tax revenues and other economic goals of common interest.<sup>121</sup>

An adjunct to the rule that the local governing body may not exercise its police power in an arbitrary, capricious, or discrimina-

land was originally of a residential character, that it had a peculiar suitability for residential use, and that the most appropriate use was residential. *Id.* at 869, 120 N.W.2d at 275. However, the defendants asserted that need was a determinative factor. A planning consultant for the defendants testified that "the welfare of the community as a whole required that the land be used for a purpose which would tend to concentrate a large number of people at that location or provide a convenience to a wide area of the city." *Id.* at 868, 120 N.W.2d at 275. Although the court noted that the evidence on the need issue proved only a difference of opinion, the court upheld the rezoning ordinance on the basis of the presumption of validity afforded the legislative classification. *Id.* See notes 94-97 & accompanying text *supra*.

117. The City Council of Lincoln, Nebraska, recently reversed its previous decision to down-zone a lot, from B-1 local business to R-3 residential, based upon evidence submitted by a property owner that the value of her property would "decrease from \$88,000 to about \$8,000 if the zoning was changed." *Lincoln Journal*, Feb. 5, 1980, at 11, col. 4. *But cf.* *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963) (mere loss of value of homes recently constructed on land adjacent to rezoned property does not render the rezoning illegal).
118. *Cf.* *Hansen v. City of Norfolk*, 201 Neb. 352, 267 N.W.2d 537 (1978) (concerning an action rezoning property from M-2 heavy industrial to M-1 light industrial, the court took note of the fact that due to a local flood control project in the area, the nature of the area changed dramatically and "[a]lmost all the businesses presently located within the area affected by the ordinance fit in the category of light industrial." *Id.* at 359, 267 N.W.2d at 541).
119. N. STEUBEN, *supra* note 115, at 256.
120. Traffic congestion was a major contention of the plaintiffs in *Bucholz*. Arguing that the proposed shopping center would not "lessen congestion in the streets" as required by statute (currently NEB. REV. STAT. § 14-403 (Reissue 1977)), the plaintiffs noted the heavy traffic which would result from rezoning. The court stated, however, that increased traffic "does not establish that the zoning is illegal. The construction of a large regional shopping center in any location would increase the traffic on the streets and highways leading to it. The real question is whether the . . . land is an appropriate location for such a development." 174 Neb. at 867, 120 N.W.2d at 274. The court emphasized the fact that the planning board did not consider the traffic load such that property in the area could not be zoned commercial. *Id.* at 867-68, 120 N.W.2d at 274.
121. N. STEUBEN, *supra* note 115, at 257. Other specific changes of conditions might include: (1) population increases; (2) new developments; (3) changes in zoning concepts; (4) extensive highway improvements; and (5) blighted areas. Arnebergh, *Criteria for Rezoning: Valid Reasons*, in 1964 INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 45 (1965).

tory manner,<sup>122</sup> is the constitutional restriction placed upon "spot zoning." Whenever a small parcel of land is given a different classification than that of the surrounding area, primarily for the benefit of the owner and to the detriment of neighboring landowners,<sup>123</sup> the term "spot zoning" raises its ugly head. However, courts treat the term as descriptive rather than legal.<sup>124</sup> Spot zoning is not necessarily invalid *per se*; its validity will be determined on a case-by-case basis. Consequently, the fact that small individual tracts are involved or that only one landowner is involved in a zoning change request does not render rezoning invalid as spot zoning.<sup>125</sup>

### A. The Amendment Process

Amendments are usually the response to a proposal made by individual property owners, citizen groups, or local officials.<sup>126</sup> These proposals are, in turn, administered by the local governing

122. See note 96 & accompanying text *supra*.

123. *Bucholz v. City of Omaha*, 174 Neb. 862, 870, 120 N.W.2d 270, 275-76 (1963).

124. *Id.*

125. *Id.* (citing *Graham v. Graybar Elec. Co.*, 158 Neb. 527, 63 N.W.2d 774 (1954)). However, spot zoning is a viable ground for invalidating a rezoning action. *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958).

'Spot zoning is invalid where some or all of the following factors are present:

'1. a small parcel of land is singled out for special and privileged treatment;

'2. the singling out is not in the public interest but only for the benefit of the landowner;

'3. the action is not in accord with a comprehensive plan.

'The list is not meant to suggest that the three tests are mutually exclusive. If spot zoning is invalid, usually all three elements are present, or, said another way, the three statements may merely be nuances of one another.'

*Holmgren v. City of Lincoln*, 199 Neb. 178, 185, 256 N.W.2d 686, 690-91 (1977) (quoting D. HAGMAN, *URBAN PLANNING & DEVELOPMENT CONTROL LAW* § 93, at 169 (1975)).

126. See, e.g., *LINCOLN, NEB., CODE* § 27.81.040 (1979) (city council may amend on its own motion or on petition). In practice, amendments before the council typically originate from the planning commission, the planning director, or individual property owners and developers. See *Hansen v. City of Norfolk*, 201 Neb. 352, 267 N.W.2d 537 (1978) (as long as statutory procedures are followed, the planning commission has power to recommend rezoning even though application required signature of property owner or its agent).

In many jurisdictions, amendments result from referendum and initiative procedures. See 6 P. ROHAN, *supra* note 7, § 39.07. Whether or not such procedures may be used is apparently unsettled in Nebraska. Compare *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956) (a city ordinance changing the zoning classification of certain property from residential to business was an administrative act not subject to referendum) with *Scottsbluff Improvement Ass'n v. City of Scottsbluff*, 183 Neb. 722, 164 N.W.2d 215 (1969) (rezoning held to be a legislative matter not subject to judicial review by a proceeding in error).

authority on a case-by-case basis—subject only to the guidelines prescribed by *Euclid*.<sup>127</sup> Thus, an amendment is arguably identical to a variance or a special exception except that it is issued by the local governing authority instead of the board of appeals or adjustment.<sup>128</sup> However, one might assert that because the amendment procedure often pivots on the piecemeal determination of peculiar facts and circumstances of each proposed development, it tends to promote the kind of discriminatory effect thought to be alleviated by these remedies.<sup>129</sup>

In villages of cities of the first and second class, any regulations, restrictions, and boundaries authorized to be created by statute may be amended.<sup>130</sup> By statute, an amendment will not become effective except by the favorable vote of three-fourths of all the members of the legislative body of a municipality whenever a protest against such change is signed by the owners of

twenty per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent on the sides and in the rear thereof extending three hundred feet therefrom, and of those directly opposite thereto extending three hundred feet from the street frontage of such opposite lots . . . .<sup>131</sup>

Public hearings and official notice requirements imposed by statute are equally applicable to amendments;<sup>132</sup> however, additional notice is specifically required by law.<sup>133</sup>

127. See notes 109-12 & accompanying text *supra*.

128. Booth, *A Realistic Examination of Rezoning Procedure: The Complimentary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753 (1976).

129. *Id.* at 764. See Peterson, *Flexibility in Rezonings and Related Governmental Land Use Decisions*, 16 OHIO ST. L.J. 499 (1975).

130. NEB. REV. STAT. § 19-905 (Reissue 1977).

131. *Id.*

132. *Id.*

133. The provisions of section 19-904 relative to public hearings and official notice shall apply equally to all changes or amendments. In addition to the publication of the notice therein prescribed, a notice shall be posted in a conspicuous place on or near the property on which action is pending. Such notice shall not be less than eighteen inches in height and twenty-four inches in width with a white or yellow background and black letters not less than one and one half inches in height. Such posted notice shall be so placed upon such premises that it is easily visible from the street nearest the same and shall be so posted at least ten days prior to the date of such hearing. It shall be unlawful for anyone to remove, mutilate, destroy, or change such posted notice prior to such hearing. Any person so doing shall be deemed guilty of a misdemeanor. If the record title owners of any lots included in such proposed change be nonresidents of the municipality, then a written notice of such hearing shall be mailed by certified mail to them addressed to their last-known addresses at least ten days prior to such hearing. At the option of the legislative body of the municipality, in place of the posted notice provided above, the owners or occupants of the real estate to be zoned or rezoned and all real estate located within three hundred feet of the

The procedures required by statute for cities of the metropolitan class are similar to those prescribed above. However, some differences are notable. For instance, protesting landowners' property adjacent to the rear or opposite of the lots included in the proposed change need only extend 100 feet therefrom or from the street frontage of opposite lots respectively.<sup>134</sup> The vote on the proposed amendment requires five-sevenths of all the members of the city council.<sup>135</sup> Finally, the notice requirements are much less detailed than those required for villages and cities of the first and second class.<sup>136</sup> There needs to be only "one day's notice of the time, place and purpose of [the public hearing on the proposed amendments] . . . published in the official paper or a paper of general circulation in such municipality, and not less than ten days before such hearing."<sup>137</sup>

In cities of the primary class, any proposed amendment must first be submitted to the planning commission for its recommendations and report.<sup>138</sup> The commission must hold at least one public

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real estate to be zoned or rezoned may be personally served with a written notice thereof at least ten days prior to the date of the hearing, if they can be served with such notice within the county where such real estate is located. Where such notice cannot be served personally upon such owners or occupants in the county where such real estate is located, a written notice of such hearing shall be mailed to such owners or occupants addressed to their last-known addresses at least ten days prior to such hearing. The provisions of this section in reference to notice shall not apply (1) in the event of a proposed change in such regulations, restrictions, or boundaries throughout the entire area of an existing zoning district or of such municipality, or (2) in the event additional or different types of zoning districts are proposed, whether or not such additional or different districts are made applicable to areas, or parts of areas, already within a zoning district of the municipality, but only the requirements of section 19-904 shall be applicable.

*Id.*

134. *Id.* § 14-405 (Reissue 1977).

135. *Id.*

136. See note 133 *supra*. The amendment process applicable to counties more closely resembles that called for by cities of the metropolitan class.

Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed. In case, however, of a protest against such change, signed by the owners of twenty per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending one hundred feet therefrom, or of those directly opposite thereof extending one hundred feet from the street frontage of such opposite lots, such amendments shall not become effective except by the favorable vote of a two-thirds majority of the county board. The provisions of section 23-164 relative to public hearings and official notice shall apply equally to all changes or amendments.

NEB. REV. STAT. § 23-165 (Reissue 1977) (counties).

137. NEB. REV. STAT. § 14-404 (Reissue 1977).

138. *Id.*



hearing before submitting its recommendations and report.<sup>139</sup> Upon receipt of this information, the city council is required to hold a further hearing before action on the amendment.<sup>140</sup> Required notice includes publication in a newspaper of general circulation at least once, and the notice must appear at least five days prior to the date of the hearing.<sup>141</sup> Furthermore, posted notice is required to be maintained in a conspicuous place on or near the property so that it is easily visible from the street.<sup>142</sup> Such posting must also occur at least five days prior to the hearing on the amendment.<sup>143</sup>

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139. *Id.* The report of the commission must include information on the effect of the proposed amendment on the comprehensive plan of the city:

Amendments. The city council may from time to time on its own motion, or on petition, amend, supplement, or otherwise modify this title. Any such proposed amendment, supplement, or modification shall first be submitted to the planning commission for its recommendations and report. Said report shall contain the findings of the commission regarding the effect of the proposed amendment, supplement, or modification upon adjacent property and upon the Comprehensive Plan of the City of Lincoln. After the recommendations and report of the planning commission have been filed, the city council shall, before enacting any proposed amendment, supplement, or modification hold a public hearing in relation thereto, giving notice of the time and place of such hearing as provided in section 27.81.050 hereafter.

In the event that the proposed amendment or change is denied by the city council, no new request shall be made for the same or substantially similar amendment or change within one year of said denial thereof.

LINCOLN, NEB., CODE § 27.81.040 (1979). For a discussion of compliance of amendments with the comprehensive plan, see § III-B of text *infra*.

140. NEB. REV. STAT. § 15-1105 (Reissue 1977).

141. *Id.*

142. *Id.*

143. *Id.* Notice requirements may vary. See LINCOLN, NEB., CODE § 27.81.050 (1979).

Public hearings required under chapters 27.63, 27.75, and 27.81 of this title shall not be held until notice thereof has been given in compliance with the following provisions:

(a) A notice shall be posted in a conspicuous place on or near the property upon which action is pending. The notice shall be posted upon or as near to the subject premises as possible so that it is easily visible from the street, and such notice shall be so posted for at least eight (8) consecutive days before the date of such hearing. It shall be unlawful for any person to remove, mutilate, destroy, or change the posted notice prior to the hearing;

(b) For public hearings required under chapter 27.81 only, at least eight (8) days before the date of hearing, the city clerk shall have published in a daily newspaper having a general circulation in the City of Lincoln a notice of the time, place, and subject matter of the public hearing;

(c) No public hearings shall be held by the planning commission or the board of zoning appeals as required in this title until the provi-

## B. The Comprehensive Plan

Nebraska law requires the adoption of a comprehensive plan as a condition precedent to the exercise of the zoning power by a municipality.<sup>144</sup> Comprehensive plans generally include a land use section and cover "all aspects of city and regional planning, embracing, among other things, forecasts as to future population and economic conditions, transportation needs, and proposals for utilities."<sup>145</sup> Consequently, zoning amendments must comply with the existing comprehensive plan.<sup>146</sup>

Judicial review of an amendment and its effect upon the comprehensive plan involves application of a test of reasonableness.<sup>147</sup> Moreover, the local council's legislative judgment is given great deference because the legal presumption favoring the validity of ordinances attaches with like vigor to rezoning legislation.<sup>148</sup>

sions of this section have been complied with and notice has been posted pursuant thereto;

(d) It shall not be necessary to give further notice of adjourned or continued public hearing;

(e) Other notice, as may be deemed appropriate by the public body conducting the hearing, may be given in advance of public hearings. Such notice is not mandatory or required as a condition precedent to any such public hearing.

*Id.*

144. *Holmgren v. City of Lincoln*, 199 Neb. 178, 181, 256 N.W.2d 686, 689 (1977).

145. *Id.* at 180, 256 N.W.2d at 688.

The general plan for the improvement and development of the city of the *primary class* shall be known as the comprehensive plan . . . . The comprehensive plan shall, among other things, show:

(1) The general location, character, and extent of existing and proposed streets and highways and railroad, air, and other transportation routes and terminals;

(2) Existing and proposed public ways, parks, grounds, and open spaces;

(3) The general location, character, and extent of schools, school grounds, and other educational facilities and properties;

(4) The general location and extent of existing and proposed public utility installations;

(5) The general location and extent of community development and housing activities; and

(6) The general location of existing and proposed public buildings, structures, and facilities.

NEB. REV. STAT. § 15-1102 (Reissue 1977) (emphasis added).

146. NEB. REV. STAT. § 19-901 (Reissue 1977) (villages, cities of the first and second class); *id.* § 14-403 (Reissue 1977) (cities of the metropolitan class); *id.* § 15-902 (Reissue 1977) (cities of the primary class).

147. 6 P. ROHAN, *supra* note 7, § 39.04.

148. *Hansen v. City of Norfolk*, 201 Neb. 352, 267 N.W.2d 537 (1978).

Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence . . . . [T]he burden is upon the party attacking it as invalid to show by

In *Holmgren v. City of Lincoln*,<sup>149</sup> the Nebraska Supreme Court sustained the validity of a zoning ordinance amendment that changed the classification of a 4.6-acre tract from Class A-2, single-family dwelling district, to Class C multiple-dwelling district. Adjacent property owners initiated the suit, claiming that the ordinance was invalid because the amendment was not "in accordance with a comprehensive plan" as required by statute,<sup>150</sup> and because the ordinance was arbitrary and unreasonable since it resulted in "spot zoning."<sup>151</sup> The plaintiffs, who were also within the A-2 classification, contended that the single-family designation fixed the use of the property, and, as such, the "in accordance with" language of the enabling statute was violated.<sup>152</sup>

The court noted that although the zoning enabling statutes in many jurisdictions include provisions requiring that zoning be conducted in accordance with a comprehensive plan, the courts have found that the term "was not defined by statute and the courts reached a variety of conclusions as to what the term meant."<sup>153</sup> The Nebraska Supreme Court concluded from the language of the statute<sup>154</sup> that the comprehensive plan was intended to be a general guide.<sup>155</sup> It favored the following definition: "It is only as a series of statements and precepts, representing community choice and decision as to the space needs of various activities and the interrelationships of land uses, that the master plan can effectively fulfill its role as a guide to regulatory action."<sup>156</sup>

The court held that the proposal was in accordance with the

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clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law.

*Id.* at 359, 267 N.W.2d at 541 (citing *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977)). See *Holmgren v. City of Lincoln*, 199 Neb. 178, 256 N.W.2d 686 (1977); *Stahla v. Board of Zoning Adjustment*, 186 Neb. 219, 182 N.W.2d 209 (1970).

149. 199 Neb. 178, 256 N.W.2d 686 (1977).

150. *Id.* at 179, 256 N.W.2d at 688. The plaintiffs cited the enabling legislation for cities of the primary class. NEB. REV. STAT. § 15-902 (Reissue 1977).

151. 199 Neb. at 179, 256 N.W.2d at 688. For a general discussion of spot zoning, see notes 123-25 & accompanying text *supra*.

152. *Id.* at 181, 256 N.W.2d at 689.

153. *Id.* at 182-83, 256 N.W.2d at 689.

154. NEB. REV. STAT. § 15-1102 (Reissue 1977).

155. 199 Neb. at 183, 256 N.W.2d at 690. The court relied on the reference in section 15-1102 to "general distribution and general location of business and industry, residential areas, utilities, and recreational, educational, and other categories of public and private land uses," as well as to "the recommended standards of population density based upon population estimates." 199 Neb. at 183, 256 N.W.2d at 690.

156. 199 Neb. at 183-84, 256 N.W.2d at 690 (quoting Haar, *In Accordance With A Comprehensive Plan*, 68 HARV. L. REV. 1154, 1174 (1955)).

plan because the amendment continued the residential use of the property as provided in the comprehensive plan, and merely authorized a higher concentration of population than that permitted by the plan.<sup>157</sup> "This [was] not a case [of] a use entirely different from that contemplated by the plan . . ." <sup>158</sup> Under the facts of *Holmgren*, multiple-dwelling and row-house uses would be allowed in addition to the existing single-family and two-family uses permitted in the higher classification.<sup>159</sup> The court also rejected the claim that the change in classification of the parcel constituted invalid spot zoning, and fully supported the city council's action.<sup>160</sup> The following factors were considered to be significant:

(1) The tract itself and the land to the east and west is largely vacant. (2) The change from the original proposed uses is not radical, that is, it is from one type of residential use to another type of residential use. (3) There is conflicting expert testimony as to whether the zone change is in the public interest. (4) There is competent, conflicting evidence to the effect that the tract of which the area in question is a part, does not, because of natural and man-made boundaries lend itself to extensive single-family development. (5) The land in question and the larger vacant tracts of which it is a part are in diverse ownership and this fact supports the conclusion that the rezoning was not for the special benefit of one single landowner to the detriment of the others.<sup>161</sup>

After *Holmgren*, attacks upon rezoning legislation on the basis of nonconformity with the comprehensive plan or on the basis of "spot zoning" may fail unless they come within the narrow range of circumstances acknowledged by the court. This again reflects the attitude taken by the judiciary in situations involving legislative activity by a municipality.

### C. Contract and Conditional Zoning

In some instances, landowners find themselves unable to comply with the requirements necessary to procure administrative or legislative relief from the application of zoning ordinances which tend to restrict the use of their land. This occurs when, for instance, the owner is unable to show "unnecessary hardship" as required for variances,<sup>162</sup> or a change of conditions sufficient to warrant rezoning legislation.<sup>163</sup> As an adjunct to the rezoning procedure, some states have allowed local legislative bodies to exact promises of specific conduct from landowners in cases where rezoning applications indicate the possibility of harm to the municipi-

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157. 199 Neb. at 184, 256 N.W.2d at 690.

158. *Id.*

159. *Id.* at 179, 256 N.W.2d at 688.

160. *Id.* at 186, 256 N.W.2d at 691.

161. *Id.* at 185, 256 N.W.2d at 691.

162. See § II-B of text *supra*.

163. See notes 115-21 & accompanying text *supra*.

pality and/or adjoining landowners. The terms commonly used to describe this alternative procedure are contract zoning or conditional zoning.<sup>164</sup>

While courts often use the terms interchangeably,<sup>165</sup> a distinction may be drawn between contract zoning and conditional zoning as devices for gaining relief from restrictive zoning. In general, the terms refer to the imposition of land use restrictions by private agreement in conjunction with the passage of rezoning legislation.<sup>166</sup> In contract zoning, an owner makes an enforceable promise to the local governing body in return for rezoning legislation or an enforceable promise for it.<sup>167</sup> On the other hand, in conditional zoning, a rezoning ordinance is passed upon the condition that the landowner perform an act prior to, simultaneously with, or after passage of the ordinance.<sup>168</sup>

The purpose of these devices is to foster flexibility in the rather rigid scheme of contemporary "Euclidean" zoning.<sup>169</sup> For example, in cases where a landowner's property borders districts with differing use classifications or where the district in which the property is located is undergoing a change of use, the application of rigid zoning concepts may preclude the owner from putting the property to its most efficient use. Contract or conditional zoning allow the owner the best use of his property while ensuring the public welfare. This is accomplished by incorporating specific restrictions on the proposed use through the agreement. Such restrictions might typically include, *inter alia*, noise abatement, traffic control, building setback and fencing requirements.<sup>170</sup> Consequently, the landowner receives the benefit of rezoning while the hardship to neighboring property owners and the municipality is ameliorated.

Contract zoning has been assailed as an invalid abrogation of the municipality's police power.<sup>171</sup> It is urged that such contracts

164. See Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968); Trager, *Contract Zoning*, 23 MD. L. REV. 121 (1963); Comment, *Toward a Strategy for Utilization of Contract and Conditional Zoning*, 51 J. URB. L. 94 (1973); Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972).

165. Note, *supra* note 164, at 831 n.38.

166. *Id.* at 830-31.

167. *Id.* at 831. Some courts have broadly characterized contract zoning as invalid. *Id.*

168. *Id.* Conditional zoning has not been criticized to the same extent as contract zoning.

169. Comment, *supra* note 164, at 95.

170. Note, *supra* note 164, at 830.

171. *Id.* at 833. This is the adjunct to the rule that "[a] city has no right or power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority." *Bucholz v. City of Omaha*, 174 Neb. 862, 873, 120

constitute a violation of public policy since they tend to shake the public's confidence in the integrity and exercise of the municipality's discretion in zoning matters.<sup>172</sup> Furthermore, the use of contract and conditional zoning is said to destroy the uniformity accomplished by the comprehensive plan, and tends to evidence a form of spot zoning.<sup>173</sup>

Although the contract and conditional zoning devices have suffered criticism, several states have specifically recognized their validity.<sup>174</sup> In response to the abrogation of police power argument, it has been asserted that an agreement between a landowner and a municipality amounts to a unilateral contract whereby the municipality acts to rezone in return for the landowner's promise. Under this construction of the agreement, neither side is held to a binding promise.<sup>175</sup> Furthermore, it is said that the integrity of the municipal body should not be tainted because all such legislation is subject to the test of reasonableness,<sup>176</sup> and because specific guidelines could be adopted for use in cases involving contract or conditional zoning.<sup>177</sup>

As to the harm caused to the comprehensive plan, it must be asserted that strict compliance to the plan in every case causes ar-

N.W.2d 270, 277 (1963) (citing *Nebraska City v. Nebraska City Speed & Fair Ass'n*, 107 Neb. 576, 186 N.W. 374 (1922)).

172. Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A. L. REV. 897, 903 (1965).

173. Note, *supra* note 164, at 835.

174. *Id.* at 833. Nebraska is said to be among the states which have upheld the use of contract or conditional zoning. *Id.* at 833 n.50.

175. Shapiro, *supra* note 164, at 270.

176. Note, *supra* note 164, at 834. For a discussion of the test of reasonableness in instances of rezoning, see notes 111-13 & accompanying text *supra*.

177. Specific guidelines might include the following considerations:

(1) The agreement should be made in such a manner that there is no abrogation of the police power, either by a promise to rezone or a promise to maintain a zone for a certain period of time. The municipality should carefully avoid any promise on its part in return for the promise of the landowner.

(2) The rezoning amendment, considered together with and subject to the landowner's promises, should be a reasonable exercise of the zoning power. Contract and conditional zoning finds its usefulness where there are competing uses within a zoning area, each having a valid claim. In some situations the rezoning alone may not be reasonable. However, the rezoning subject to the imposed restrictions may be reasonable. The court should consider both the rezoning and the landowner's promise in determining the validity of the ordinance. If the rezoning is unreasonable, even with the restrictions, the ordinance should be declared invalid.

(3) The landowner's promise should be either already performed or enforceable by the city so as to insure performance. This means the court should consider the nature of the agreement between the landowner and the city. Since the restrictions are worthless if they are unenforceable, and since the validity of the ordinance

bitrary determinations and undue hardships.<sup>178</sup> Arguably, the flexibility afforded by these remedies would alleviate arbitrariness when scrutinized under specific guidelines. Finally, questions concerning spot zoning could be determined on a case-by-case basis under the considerations applicable to all such instances.<sup>179</sup>

Methods which have been used to implement contract or conditional zoning include: (1) a unilateral contract between the city and landowners;<sup>180</sup> (2) a bilateral contract between the planning commission and the landowner;<sup>181</sup> (3) an ordinance conditioned upon a physical act to the property;<sup>182</sup> (4) an ordinance conditioned upon an act involving other property;<sup>183</sup> and (5) an ordi-

may depend upon its modification by the restrictions, their enforceability is a legitimate concern of the court.

(4) The promises exacted should have a reasonable relation to the rezoning, *i.e.*, the rezoning itself should give rise to the need for the restrictions which are imposed. This relation may be established either by the community's need for protection against potentially deleterious effects of the rezoning, or by the community's need for public service facilities occasioned by the new use. Thus the agreement may legitimately restrict the landowner's use of his property, or it may require that he dedicate land to the city for public use. However, extraneous consideration, such as giving land for a park elsewhere in the city, would impeach the legislation by implying that influence other than the worth of the rezoning was a part of the decision-making process.

Note, *supra* note 164, at 846 (footnotes omitted). For a list of other broad suggestions in this regard, see Comment, *supra* note 164, at 111.

178. One commentator has argued that "the very specific requirements generally embodied in proposed concomitant conditions are difficult, at best, to subsume under the broad purposes enunciated in the comprehensive plan, especially when the zoning ordinance, enacted ostensibly as the chief embodiment and manifestation of the plan, speaks in traditional 'Euclidean' terms." Comment, *supra* note 164, at 106. Nevertheless, variances in general, and many acts of rezoning often conflict with the general *guidelines* imposed by the comprehensive plan. This occurs primarily as a result of an attempt to alleviate the harm caused by the slavish application of the zoning ordinance.
179. See notes 123-25 & accompanying text *supra*.
180. Note, *supra* note 164, at 837. Under this method, the city can enforce the agreement by specific performance, and if the contract also provides for a covenant running with the land, it is enforceable by the city against subsequent purchasers. *Id.*
181. *Id.* at 838. It has been asserted that a bilateral agreement between the planning commission and the landowner would not operate as an abrogation of the police power since the agreement would only call for a favorable recommendation on the part of the commission. *Id.* Compare *Pressman v. City of Baltimore*, 222 Md. 330, 160 A.2d 379 (1960) with *City of Greenbelt v. Bresler*, 248 Md. 210, 236 A.2d 1 (1967).
182. Note, *supra* note 164, at 839. It has been suggested, however, that this arrangement would result in innumerable new use classifications for individual tracts. Shapiro, *supra* note 164, at 280.
183. Note, *supra* note 164, at 840. This contemplates a dedication of other land by the owner as a condition precedent to passage of the rezoning ordinance.

nance conditioned upon the execution of a restrictive covenant.<sup>184</sup> The most desirable of the foregoing methods should be the one which least limits the exercise of the municipality's police power. While not necessarily exclusive, the unilateral contract would appear to be the most desirable in this regard.<sup>185</sup>

The Nebraska Supreme Court has apparently approved the use of contract or conditional zoning. In *Buchholz v. City of Omaha*,<sup>186</sup> a landowner and a developer with an option to purchase filed an application to rezone a part of a larger tract of land for use as a new shopping center.<sup>187</sup> Following a public hearing on the matter, the Planning Board recommended that the application be denied. After a second hearing, the City Council adopted a motion that stated it did not concur in the recommendation of the planning board. The motion also directed that "rezoning ordinances and protective covenants be prepared."<sup>188</sup> Ordinances were enacted which rezoned the parcel, and the council approved a protective covenant agreement submitted to it by the landowner and the option holder.<sup>189</sup>

The presence of the protective covenant agreement gave rise to a challenge to the legality of the rezoning. Adjacent landowners, as plaintiffs, contended that the action of the council was the result of a bargain or agreement between the applicants and the city.<sup>190</sup> Although the court "assume[d] that the protective covenant agreement was an inducement to the adoption of the rezoning ordinances,"<sup>191</sup> it nevertheless concluded that the protective covenant agreement did not invalidate the ordinances.<sup>192</sup>

The rezoning ordinances were adopted without reference to the protective covenant agreement. Moreover, the agreement expressly provided that it was not conditioned upon a rezoning of the land.<sup>193</sup> It provided that the covenants would run with the land and would be for the use and benefit of the owner, the city, and the adjoining landowners.<sup>194</sup> The prospective buyer, made a party to the agreement, was bound to specific conditions.<sup>195</sup> Consequently,

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184. *Id.* Note, however, that if the landowner is simply required to execute and record a restrictive covenant prior to passage, it may be rendered unenforceable as a unilateral declaration of intent by the owner.

185. See note 180 *supra*.

186. 174 Neb. 862, 120 N.W.2d 270 (1963). See Note, *supra* note 164, at 833 n.50.

187. 174 Neb. at 864, 120 N.W.2d at 273.

188. *Id.* at 865, 120 N.W.2d at 273.

189. *Id.*

190. *Id.* at 873, 120 N.W.2d at 277.

191. *Id.* at 872, 120 N.W.2d at 276.

192. *Id.* at 875, 120 N.W.2d at 278.

193. *Id.* at 872, 120 N.W.2d at 276.

194. *Id.*, 120 N.W.2d at 277.

195. *Id.* The developer agreed to provide a grade-separated access to the shop-



the agreement also included a direction by the council that covenants be submitted to the city to insure that the representations of the buyers would be fulfilled. In the event of breach, or in the event that the sale was not made and land not conveyed to the buyer, the city could again rezone the parcel.<sup>196</sup> On the basis of the foregoing agreement, the court stated:

The evidence in this case does not show a bargain or agreement between the applicants and the city. There is evidence that the applicants made certain representations to the city council and other officials in an effort to secure the rezoning . . . Rezoning applications are usually supported by similar representations concerning the proposed use of the land in question and, in many cases, may be an inducement for the action taken by the zoning authorities. No one contends that an applicant for rezoning should not disclose the proposed use to be made of the land involved. The contention is that the applicants should not be allowed to give some assurance that the proposed plans will be carried out.

The applicants in this case have merely agreed to do things which they have represented that they intend to do. The effect of the protective covenant agreement is to give some further assurance to the city and the adjoining landowners that the representations of the applicants were made in good faith.

The effect of the protective covenant agreement is to give the city council greater control over the development of the property which was rezoned.<sup>197</sup>

The court stated that the plaintiffs, as adjacent landowners, failed to show that they were prejudiced by the agreement.<sup>198</sup> It believed that all of the conditions set forth in the covenant could have been accomplished without the agreement. Furthermore, if there was a breach of the agreement, the property could have been rezoned even in absence of a provision to that effect.<sup>199</sup>

It is difficult to determine how the court characterized the type of zoning involved in *Bucholz*, *i.e.*, whether the covenant more closely reflected contract or conditional zoning. From the somewhat negative characterization of "bargain" present in the court's language, one might conclude that a conditional arrangement seemed more acceptable to the court. Indeed, the "control" element noted by the court would appear to evidence the dangers believed to be inherent in contract zoning. This is supported by the court's assertion that the covenant agreement merely gave "assurance" to the city. Nevertheless, the court's concession that "inducement" existed would tend to support the contrary conclusion.

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ping center without cost to the city, and that a portion of the land would be maintained as a buffer zone.

196. *Id.* at 874, 120 N.W.2d at 277.

197. *Id.* at 873-74, 120 N.W.2d at 277.

198. *Id.* at 874, 120 N.W.2d at 278.

199. *Id.*

In the final analysis, the court's approach is a "classic hedge,"<sup>200</sup> and stands only for the proposition that, in at least some circumstances, contract or conditional zoning will be upheld in Nebraska.<sup>201</sup>

#### IV. CONCLUSION

Avenues of relief from restrictive zoning must reflect a proper balance between interests. One interest, important to both society and the individual property owner, is the assurance that property will not lie idle. On the other hand, all citizens benefit by the universal interest in the public health, safety, and welfare as reflected in zoning legislation which often restricts the use of property. The variance procedure would appear to recognize these interests and allow for such a balancing process. However, due to a lack of clearly understandable, distinct and consistent standards for cases involving requests for a variance, these interests might be lost in the shuffle. This problem is exacerbated by the almost blind deference afforded the board's determination on review. One attempt at alleviating this problem might involve a more comprehensive legislative determination of criteria relevant to the "unnecessary hardship" and "practical difficulties" standards for all classes of cities.

A similar kind of legislative determination would be helpful in the area of rezoning. Such action should include delineation of a set of factors which, in the judgment of the legislature, might constitute sufficiently "changed" conditions. Hopefully, this might reduce the amount of arbitrary and discriminatory rezoning legislation. Finally, the expanded use of contract or conditional zoning might prompt a more controlled atmosphere—one in which the private property owner may be able to put his land to its most efficient use while allowing the local governing body to maintain the public welfare at the lowest dollar cost. What is needed in regard to contract and conditional zoning is a thorough examination by either the legislature or the courts. An explicit analysis of the range of acceptable activity in this area would be a good starting point.

*Thomas Sattler '80*

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200. Comment, *supra* note 164, at 95.

201. See note 174 *supra*.